

**EXHIBIT “H”  
(Part 1)**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
EVART ENTERPRISES, INC., : 07-CV-5441 (DLC)  
 :  
Plaintiff, : September 11, 2007  
 :  
v. : 500 Pearl Street  
 : New York, New York  
GENTLEMAN'S VIDEO, INC., et al., :  
 :  
Defendants. :  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE DOUGLAS F. EATON  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: H. NICHOLAS GOODMAN, ESQ.  
Quirk & Bakalor  
845 Third Avenue  
New York, New York 10022

For the Defendant: EDWARD RUDOFISKY, ESQ.  
Zane & Rudofsky  
601 West 26th Street  
New York, New York 10001

Court Transcriber: CARLA NUTTER  
TypeWrite Word Processing Service  
356 Eltingville Boulevard  
Staten Island, New York 10312

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1 THE COURT: 07-CV-5441.

2 All right. We're here with Nicholas Goodman for  
3 plaintiff Evart Enterprises and Edward Rudofsky for defendants  
4 Gentleman's Video, et al.,

5 Mr. Goodman, what's the status of this case?

6 MR. GOODMAN: Okay, Judge, just to go back to your  
7 initial comments about the two cases pending, there was a  
8 previous case and I don't have the index number in front of me.  
9 I could find it.

10 THE COURT: I have it. 06-CV-13207.

11 MR. GOODMAN: Okay. Thank you, Judge.

12 That case was settled by a settlement agreement dated  
13 January 29, 2007 and there was subsequently a consent order and  
14 permanent injunction signed by Judge Cote in February. In  
15 March I sent a letter to Mr. Rudofsky indicating a default  
16 under the settlement agreement and my threat to proceed with  
17 contempt proceedings. I have not since followed through on  
18 that threat and we are not here pursuing contempt remedies  
19 under that settlement. So that basically all that's here  
20 before you today is the second case, that's 07-CV-5441. That  
21 is a case in which Mr. Rudofsky and I were unable to come to  
22 any kind of agreement in the period of April or May. The first  
23 complaint is filed and served in June. There was an extension  
24 of time granted by Your Honor until the end of July to answer  
25 or move. Mr. Rudofsky made a motion. I then filed an amended

1 complaint and that amended complaint is before you today and  
2 the defendants have not yet answered that amended complaint.  
3 In fact, their time to answer doesn't run until tomorrow and  
4 obviously we would be amenable to a reasonable adjournment or  
5 extension of the time to answer. So what you have before you  
6 today is just that second case and the second case involves two  
7 different copyright infringements and we're alleging, also,  
8 trademark Lanham Act infringements.

9           Your question was as to the status of settlement.  
10 It's been clear from the beginning that Mr. Rudofsky and his  
11 clients have sought to convince me and apparently to convince  
12 the Court also that the second action in their words is not  
13 warranted or should not proceed, that they would like it not to  
14 happen. I have attempted at various points including recently  
15 last week to try to translate that into a settlement  
16 negotiation over money. There has not been up until just prior  
17 to this conference an offer by the defendants in settlement and  
18 just to let you know more accurately where we're at today, last  
19 week on Tuesday I spoke to Mr. Rudofsky and I said, look, I  
20 know you want to bring your client to the conference in front  
21 of Magistrate Eaton, I know you want to have some kind of  
22 discussion but you've got to make some kind of offer, are you  
23 going to make an offer of settlement because otherwise I don't  
24 see that it's worth me bringing my client in or pursuing that  
25 whole course if there isn't going to be any offer at all and

1 that was on Tuesday. On Friday I got an e-mail from Mr.  
2 Rudofsky saying, I'm talking to my clients, I'll get you an e-  
3 mail shortly to tell you where we're at in effect. I never got  
4 that second e-mail and Mr. Rudofsky told me this morning that  
5 he did in fact send that e-mail. I never saw it. So he has  
6 now conveyed to me what is apparently in that second e-mail  
7 that I didn't get which was a very minimal settlement offer.  
8 It really amounts to a few thousand dollars literally.  
9 Obviously, I haven't had a chance to convey that to my client  
10 but I can tell you that it's certainly not sufficient to settle  
11 this case or really not sufficient to even stimulate further  
12 serious discussions.

13           So that's where we're at. We have as of, you know, a  
14 few minutes ago the conveyance of a very minimal settlement  
15 offer. We are certainly willing on our end as a plaintiff to  
16 engage in discussions. I've told Mr. Rudofsky repeatedly that  
17 we would be interested in settling this case. We're not trying  
18 to push thing and put anybody out of business or "hurt anybody"  
19 but there has to be a recognition of the serious copyright  
20 infringements that have taken place. The clear likelihood -- a  
21 high probability that there's going to be a finding of  
22 willfulness, the mere certainty that there's going to be a  
23 finding for the plaintiffs for the attorneys fees expended,  
24 those attorneys fees are already in excess of the amount of the  
25 offer that was conveyed to me. I don't know the exact number

1 but that can be ascertained pretty quickly.

2           So, you know, at the point that the defendants want  
3 to step up and recognize that there are two very serious  
4 infringements here, the high likelihood of a finding of  
5 willfulness and attorneys fees, statutory damages, you know,  
6 I'm sure we can talk but that point hasn't arrived yet and so  
7 in the absence of going forward and having a serious settlement  
8 discussion we're ready to enter a scheduling order and get  
9 discovery lined up and get a trial date set for the future and  
10 move forward.

11           THE COURT: Well, all right. I see that neither side  
12 has brought a decision-maker from the client.

13           MR. RUDOFSKY: May I address that?

14           THE COURT: Sure.

15           MR. RUDOFSKY: Good morning.

16           First of all, I did want to start on that point. I  
17 somewhat want to apologize to the Court. The plan was for Mr.  
18 Esposito to be here. Unfortunately, Mrs. Esposito was severely  
19 injured and hospitalized and I spoke to him as late as about  
20 7:30 or so New York time last night and he said he was just  
21 unable to leave California and leave her. I have his phone  
22 number. He is available, notwithstanding the time difference,  
23 if there was anything to discuss. So I apologize to the Court  
24 for that because certainly one of the reasons we had scheduled  
25 a conference for today was to enable him to make arrangements

1 to come and unfortunately he couldn't do that.

2 Secondly, I do want to reaffirm what counsel said. I  
3 absolutely sent -- and I don't know why he didn't receive it or  
4 didn't see it -- him an e-mail last Friday night after  
5 discussion with the client outlining the settlement proposal  
6 that we were prepared to go forward with or at least to discuss  
7 so it's unfortunate that he didn't see it but he says he  
8 didn't.

9 Let me back up now if I may. The first case was  
10 commenced, I believe, in November 2006 and we settled it pre-  
11 answer in good faith, entered into a settlement agreement,  
12 entered into a consent injunction which we have carried forward  
13 with. We received a letter from Mr. Goodman on March 29th in  
14 which he complained about several alleged breaches or possible  
15 breaches of that agreement including -- and, this, I think is  
16 important -- the facts upon which the present complaint is  
17 based -- the new complaint. We immediately or very quickly if  
18 not immediate in the sense of the same day or two days later  
19 but very, very soon thereafter, we compiled a list of  
20 everything that the defendants had done to comply with the  
21 prior settlement agreement. There were one or two ministerial  
22 items that had to be attended to; filings of an affidavit of  
23 compliance or some such thing with the court. We took care of  
24 that. We wrote to Mr. Goodman, we outlined everything that had  
25 been done --



1 THE COURT: I've read that letter of April 26th.

2 MR. RUDOFSKY: I'm sure Your Honor has.

3 THE COURT: Yes.

4 MR. RUDOFSKY: Notwithstanding that, the plaintiffs  
5 decided to go ahead with a second suit and asked if we would  
6 accept service of a complaint which we eventually did, of  
7 course, but when we realized the plaintiffs wanted to bring --  
8 the intention was to bring a second action rather than to treat  
9 the situation as enforcement of the original stipulation and  
10 consent decree we immediately wrote to Judge Cote and requested  
11 a conference. We have the complication of the second action  
12 because plaintiff has chosen to file a second action which,  
13 whether it's a meritorious action or not, I guess one would say  
14 was there right. So we end up talking about two actions but  
15 from our point of view we entered into a settlement which  
16 includes a provision for notice of defaults and an opportunity  
17 to cure defaults expressly. We were notified of the default,  
18 we cured it or say we cured it. The client is prepared to  
19 explain, whether it's a hearing or a trial or a settlement  
20 conference, or whatever forum or venue, is prepared to explain  
21 everything that he has done and if requested -- you know, if  
22 he's asked he'll say whether he's willing to do and he tells me  
23 he is willing to do anything within reason to police the  
24 original settlement which was a substantial settlement of  
25 \$75,000.00 and was intended to buy peace between these two



1 sides and the words that we used in our letter was that we did  
2 not think the second suit was necessary or appropriate and that  
3 is really our position and we think there was a settlement, we  
4 don't think that the second suit should go forward. If it's  
5 going to go forward, of course, we're going to defend it.

6 Complicating the settlement is the fact that the  
7 client tells me and I represent to Your Honor that at least  
8 this is his position and if he was here he would tell you  
9 himself that he doesn't have the money to deal with the kind of  
10 settlement demand that is being made which is a larger demand  
11 in amount than the first settlement. So it's not only  
12 substantial, it's even more substantial and so putting aside  
13 any analysis of the merits or the risk of litigation, he  
14 doesn't have the money.

15 We also would like to settle this. We thought we had  
16 settled it. If there are problems as there inevitably are or  
17 often are in such cases with policing the settlement we don't  
18 think those problems are to be solved with a second lawsuit,  
19 they're to be solved with either telling us what else the  
20 plaintiff would like us to do to police the first settlement  
21 and implement the first settlement or if we are contemptuously  
22 violating the consent order which we do not believe is remotely  
23 the case, to move to hold us in contempt but they haven't done  
24 that. They threatened to do it, they didn't do it. I think we  
25 made a clear showing not only that we weren't in contempt but

1 that we hadn't really violated the order and there may well be  
2 product out there that our client has sought to recall, has  
3 offered to substitute replacement product, third parties/fourth  
4 parties who have the product who are not complying with the  
5 recall or are continuing to offer this line that the plaintiff  
6 objects to. The end result, I think, is going to be testimony  
7 that our client has done as much as he possibly can and  
8 certainly as much as he could reasonably be required to do. He  
9 tells me this has cost him in lost sales and enforcement  
10 efforts well in excess of \$100,000.00, that he can't do anymore  
11 and that Mr. Goodman was explaining to me earlier that even as  
12 late as whatever date he was referring to, May or July or  
13 something, someone put up this line on the internet and it's  
14 hard to believe -- it's impossible for him to believe that my  
15 client wasn't the source of it. That's not true and my client  
16 is able to establish that he has sent a recall notice and taken  
17 down the line and done everything that he believes is  
18 reasonable to satisfy the plaintiff and if there is something  
19 else that he should be doing, you know, there shouldn't be the  
20 litigation form of twenty questions.

21 THE COURT: Well, you know, I think this is --

22 MR. RUDOFISKY: So that's our position. We would love  
23 to settle this but (a) we're not sure what they want us to do  
24 on the non-financial side other than what we've done and on the  
25 financial side at this moment we don't have the wherewithal to

1 satisfy their financial demands and on that basis alone the  
2 parties are too far apart to settle it certainly today.

3 THE COURT: Well, I think that's right and, you know,  
4 I think Judge Cote was hoping that somehow there could be a  
5 settlement. It sounds to me as if the non-monetary part  
6 probably could be worked out but the monetary part, the parties  
7 are just way apart and, therefore, I think Judge Cote is going  
8 to be the one who is going to decide whether this second case  
9 can proceed and I think all I can do is set up a scheduling  
10 order. Mr. Goodman is willing to give you a little time beyond  
11 tomorrow, September 12th, and I don't know whether you're going  
12 to put in an answer or a motion to Judge Cote. Do you have any  
13 idea what the first step would be?

14 MR. RUDOFISKY: Well, we will make a motion with  
15 respect to the amended complaint. We had moved with respect to  
16 the first complaint. Counsel cured what we perceived to be a  
17 defect in that pleading.

18 THE COURT: Right. So now we have an amended --

19 MR. RUDOFISKY: So now we have an amended complaint  
20 and we'll move on the grounds of the prior settlement,  
21 certainly, and see what comes of that.

22 THE COURT: Well, if we're sure that it's going to be  
23 a motion, I don't know that there's any need for discovery  
24 before that motion is heard by Judge Cote. What's plaintiff's  
25 view on that?

1 MR. GOODMAN: Well, I am having a hard time  
2 understanding what the grounds of the motion would be; that a  
3 motion to dismiss a complaint that alleges two copyrighting  
4 infringements on the grounds that that case cannot proceed  
5 because a prior settlement was entered and the remedy should be  
6 pursued under that settlement? I'm not sure that --

7 THE COURT: I think that's essentially it and Judge  
8 Cote may agree or disagree but that's her call. She may for  
9 all I know feel that the whole point of that consent order that  
10 she signed was to handle situations like this. On the other  
11 hand, she may agree with plaintiff that it's plaintiff's right  
12 to pursue this as a new lawsuit without calling it a violation  
13 of the old consent agreement and my only question is is there  
14 any sort of limited preliminary discovery that's needed before  
15 Judge Cote decides that motion? If not, I would think that we  
16 would schedule nothing today except a briefing schedule for  
17 Judge Cote and then after she makes her decision then we could  
18 have another conference here or even by telephone or, perhaps,  
19 the attorneys could just get together a scheduling order if in  
20 fact Judge Cote says, yes, this is going to be a full-fledged  
21 second lawsuit and then there will be deadlines for fact  
22 discovery, expert discovery and a deadline for motions for  
23 summary judgment and somewhere in this whole process maybe the  
24 parties will reach some agreement. The big sticking point  
25 seems to be the amount of money and if that could be solved I

1 have a feeling that the non-monetary portions could be settled  
2 --

3 MR. GOODMAN: Your Honor.

4 THE COURT: Yes.

5 MR. GOODMAN: If I could? I'm sorry, I didn't mean  
6 to interrupt.

7 It seems to me that even if -- and I think that it's  
8 very doubtful it would go that way -- but even if Judge Cote  
9 determines somehow that the second action could not proceed as  
10 a second action but remedies were to be pursued under the  
11 settlement agreement, I don't see really how that could happen.  
12 But assuming that happened there clearly are two copyright  
13 infringements that happened --

14 THE COURT: Right.

15 MR. GOODMAN: I don't think there's any doubt about  
16 it. I don't think Mr. Rudofsky or his clients even dispute  
17 that. They may say that they were innocent, they may say we  
18 took as many steps as we could to stop that from happening and  
19 so forth but there has to be even under the terms of the  
20 settlement agreement if you want to look at it through that  
21 prism some remedy for what they did. Let's not forget that one  
22 of these two infringements occurred for the first time after  
23 the settlement agreement was signed. They released a new film  
24 four days after they signed off on the settlement agreement.

25 THE COURT: The two ones I know about had been

1 abbreviated as Hart and Fox.

2 MR. GOODMAN: Fox came out after the settlement  
3 agreement was entered into. It didn't even exist prior. It  
4 has a purported 2007 copyright notice on it from the defendants  
5 and that's why we're talking about willfulness, that's why  
6 we're talking about a number of other issues.

7 Clearly, there would need to be discovery under any  
8 rubric for what happened as Mr. Rudofsky eluded to. Some time  
9 in the neighborhood of just a few weeks ago my clients got a  
10 telephone call, do you realize the entire Golden Age of Porn  
11 line including the titles from the first action are available  
12 now on the internet on a site called Smashbox.com. The whole  
13 line is there. It came up for the first time -- they found it  
14 for the first time in August. Apparently, it had been put on  
15 the internet in May 2007. They've probably purchased this  
16 product, you know, somewhere between ten and fifteen times and  
17 that's only the times they actually documented purchases. So  
18 there's a world of information that we would need concerning  
19 remedies no matter whether you're looking at those at remedies  
20 under the settlement agreement or remedies or the new action.  
21 We would like to proceed with that and I don't think it's  
22 useful to go back to Judge Cote with a motion and to enter a  
23 briefing schedule now in the absence of that kind of discovery  
24 because we're just going to get there one way or the other  
25 anyway and I think it's worth me saying here to you and to Mr.



1 Rudofsky, I made a judgment that contempt -- the showing  
2 necessary for a finding of contempt might not be made; it might  
3 be made or it might not be made and the issue there was whether  
4 the copyrights for the two new infringements were in the name  
5 of Evert and in fact they were in a different name because  
6 Evert acquired them through a chain of title and they weren't  
7 originally registered under the name Evert. So I made a  
8 determination that a showing of contempt would be an open  
9 question that we didn't want to pursue but, nonetheless, there  
10 are infringements there. The fact that they don't amount to  
11 contempt under the standards that are applied to contempt  
12 proceedings doesn't mean they weren't copyright infringements,  
13 doesn't mean they weren't willful, doesn't mean that there  
14 isn't remedy due and we pursue the second action. All of this  
15 was discussed more or less and there were a bunch of e-mails  
16 and telephone conferences and so forth that we had over a  
17 period of months.

18 So that's where we're at. So I think it would --

19 THE COURT: Well, what if it turns out despite your  
20 wishes that Judge Cote says, I've accepted the second case as a  
21 related case but I don't want it to go forward as an  
22 independent action, I want it to be pursued solely as a  
23 contempt type of proceeding? If that is her decision then your  
24 settlement evaluation may go down because you may feel that  
25 although you don't like it there are some legal impediments to



1 winning on the contempt theory because the copyright of Hart  
2 and Fox was originally obtained by a non-party and then somehow  
3 acquired by this defendant and, you know, you'll just have to  
4 make an evaluation if that changes your settlement posture and  
5 I just don't see that there's any urgency to taking this  
6 discovery. It seems to me logical that the first question is  
7 the one that will have to be decided by Judge Cote as to  
8 whether this is being handled solely as a contempt or as  
9 plaintiff would prefer it, a complete second action. I don't  
10 think any discovery is needed by either side at the moment. I  
11 don't think there's a danger that evidence is going to be lost  
12 or memories fade and both sides seem to think that it's  
13 significant to know whether or not Judge Cote is going to allow  
14 this as a full-fledged second action so let's find out and then  
15 it may well be that the discovery is more or less the same  
16 discovery no matter what her decision is but at least the  
17 parties will know what her feeling is, what her ruling is and  
18 before they embark on that discovery maybe they will have a  
19 chance to settle the case if they feel that her decision has  
20 somehow made the case less valuable or more valuable for the  
21 plaintiff.

22           So my inclination is just to set a briefing schedule  
23 for Judge Cote. I have a feeling that she distinctly saw that  
24 possibility coming and was hoping that the parties could just  
25 reach a settlement and avoid that briefing but, you know, it